Supreme Court, U.S.
FILED
SEP 9 1992
OFFICE OF THE CLERK

No. 92-79

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GABE KAIMOWITZ,

Petitioner,

v.

BILL FREDERICK, THE ORLANDO TIMES,
DR. CALVIN COLLINS, LOTTIE COLLINS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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September 9, 1992

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QUESTIONS PRESENTED

In accordance with rule 15.1, Rules of the Supreme Court, the Respondent submits that the questions presented for review by Petitioner do not accurately depict the issues before this court because they do not accurately reflect conflicts between the circuit courts and they do not accurately reflect the lower court's holding.

I. Whether there exists a sharp division in the circuits regarding whether a claim that has survived pretrial dismissal motions and received a full scale trial can be unsupported in fact or unwarranted in law within the meaning of Rule 11.

II. Whether there exists a sharp division in the circuits regarding whether to adopt the "least severe sanction" test for reviewing Rule 11 sanctions.

III. Whether there exists a sharp division in the circuits regarding whether the collateral costs of judicial administration, such as juror fees, may be awarded as a Rule 11 sanction.

IV. Whether the current conflict between the circuits regarding whether 28 U.S.C. §455(a) mandates that the cause of a judge's partiality or bias must stem from an extrajudicial source, is applicable to the case at bar.

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The Respondent, Bill Frederick, requests that this Court deny the Petition for Writ of Certiorari seeking review of the per curiam affirmance by the Eleventh Circuit Court of Appeals entered March 11, 1992.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. §144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. §455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.

28 U.S.C. §1920

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. §1927

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

42 U.S.C. §1988

In any action or proceeding to enforce a provision of sections 1977, 1977A, 1981, 1982, 1983, 1985 of this title, title IX of Public Law 92-318, ot title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Federal Rule of Civil Procedure 11

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signatures of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The Respondent, Bill Frederick, cannot accept the Petitioner's statement of the case because it also incorporates argument for the Petitioner's position. On February 27, 1989 the Petitioner, who is an attorney, filed a pro se Complaint for Injunctive Relief and Damages in the United States District Court for the Middle District of Florida. (R 1-1) Defendants named in the Complaint included *The Orlando Times*, a weekly newspaper targeted to African-Americans, the owner and publisher of the newspaper, Dr. Calvin Collins, and his wife, Lottie Collins, who acted as the manager of the newspaper. Also named as a Defendant was Bill Frederick, the Mayor for the City of Orlando, Florida. Bill Frederick was sued in both his individual and official capacities.

The Petitioner was Consulting Managing Editor of *The Orlando Times* from November 1, 1986, until March, 1987. In March of 1987 the Petitioner was terminated by the newspaper Respondents. The owners of the newspaper testified that they terminated the Petitioner for being insubordinate. (R 7-188 through 208) Petitioner contends that he was discharged by the newspaper as part of an active conspiracy among the Respondents to violate Petitioner's civil rights. He claimed that the Collinses, whom are black, discriminated against him on the basis of his race and ethnicity. Petitioner is a white Jewish male.

Following his termination from *The Orlando Times*, Petitioner filed a lawsuit alleging violations of 42 U.S.C. §1981, 1983 and 1985. The Complaint alleged that Mayor Frederick had used his political power to have Petitioner terminated. Petitioner claimed that Frederick and *The Orlando Times* conspired to cause Petitioner's

termination from the newspaper and ruin his reputation among African-Americans in the Orlando area.

Respondent Frederick filed a Motion to Dismiss the Complaint. (R 1-14) Soon thereafter Frederick filed a Motion for Rule 11 Sanctions contending that Petitioner's lawsuit and Complaint were frivolous. (R 1-19) The District Court judge denied the Motion to Dismiss and deferred ruling upon the Rule 11 motion until the completion of trial. (R 1-14, 71) In his order denying one of these Motions for Summary Judgment the court wrote:

> "The court is unable to determine if there are any issues of fact against the Mayor. The court must await testimony at trial to see if sanctions will be appropriate against the Plaintiff for failing to prove any issues against the Mayor which are not frivolous." (R 2-71)

During the trial each of the individually named Respondents took the stand. Dr. Collins and Lottie Collins conceded that they were responsible for the decision to terminate the Petitioner from *The Orlando Times*. (R 7-57-277; R 9-48-81) They testified the Petitioner was terminated for insubordination. Dr. and Mrs. Collins emphatically denied that Mayor Bill Frederick had any part in the decision to terminate the Petitioner.

The Mayor also emphatically denied having any conversations with the Collinses about the Petitioner. (R 8-134, 135) Furthermore, the Petitioner failed to present any evidence to suggest that the Collinses or Mayor Bill Frederick had ever discussed the Petitioner and his employment at *The Orlando Times*. Respondent Frederick moved for a directed verdict at the close of Petitioner's Case in Chief which was denied in part and

granted in part. (R 8-183 through 233) On November 9, 1990 the jury returned a verdict in favor of all the Respondents on the claims presented by the Petitioner. The court entered a judgment for Respondents and also entered an "Order to Show Cause" requiring Petitioner to show cause why he should not be found responsible for Rule 11 Sanctions. (R 3-119) Prior to a hearing upon the Order to Show Cause, Petitioner filed with the Eleventh Circuit a Petition for Writ of Mandamus. Petitioner sought to stay the lower court proceedings and further asked the judge be disqualified or recused from presiding over the case. The Eleventh Circuit denied Petitioner's Petition for Writ of Mandamus on November, 19, 1990. (R 3-136)

On November 16, 1990 the trial court ordered sanctions from the bench and required Petitioner to pay Defendants courts costs and counsel fees. (R 3-135) On December 17, 1990 the trial court entered an Order stating that "[b]ased on the evidence adduced at the hearing and on the court's observations of the pleadings and of the trial, the court determined that this lawsuit was frivolous and vexatious from the beginning." (R 4-148) During the hearing the court stated why it had not previously disposed of the Petitioner's case by way of Motion to Dismiss or Motion for Summary Judgment.

> "Plaintiff contends that the Complaint must have had some merit because it withstood Defendant's Motion to Dismiss and Motions for Summary Judgment and because the court sent the case to the jury for deliberation on the merits rather than direct a verdict in favor of Defendants at the close of Plaintiff's case. The court, however, allowed the case to go to trial not because Plaintiff presented sufficient evidence to withstand the pretrial motions, but

because the court wanted to see whether Plaintiff could present any evidence at trial . . . Finally, Plaintiff has repeatedly accused the court of prejudice. As a result, the court sent the case to the jury not because of a perceived factual basis for the claim, but because it wanted Plaintiff to receive a jury verdict. Only then would Plaintiff know that the outcome of the case was based on the merits rather than on judicial bias." (R 4-148-3 and 4)

The court ordered Petitioner to pay sanctions and attorney's fees imposed jointly under Rule 11, Fed. R. Civ. P., and 42 U.S.C. §1988. Petitioner was ordered to pay $27,203.50 in attorney's fees to Defendant Frederick; $8,018.75 in attorney's fees to *The Orlando Times* Defendants; and $2,138.55 to be paid to the court to compensate for the administrative costs and expenses of the proceeding, particularly juror's fees. (R 4-148)

The Eleventh Circuit affirmed without opinion and denied Petitioner's Motion for Rehearing and Suggestion of Rehearing en banc.

REASONS FOR DENYING THE WRIT

POINT I

THERE DOES NOT EXIST A SHARP DIVISION IN THE CIRCUITS REGARDING WHETHER A CLAIM THAT HAS SURVIVED PRETRIAL DISMISSAL MOTIONS AND RECEIVED A FULL SCALE TRIAL CAN BE UNSUPPORTED IN FACT OR UNWARRANTED IN LAW WITHIN THE MEANING OF RULE 11.

This Court has held that the main objective of Rule 11 is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses. *Business Guides, Inc. v. Chromatic Comm.*, 498 U.S., ___ , 112 L.Ed.2d 1140, 1160, 111 S.Ct. 922 (1991).

Like the imposition of costs, attorney's fees, and contempt sanctions, a Rule 11 sanction is not a judgment on the action's merits, but simply requires the determination of a collateral issue, which may be made after the principal suit's termination. *Cooter & Gell v. Hartmarx Co.*, 496 U.S. 384 (1990). The time when sanctions are to be imposed rests on the discretion of the trail judge. However, it is anticipated that in the case of pleadings, the sanctions issue under Rule 11 normally will be determined at the end of the litigation. Fed. R. Civ. P. 11 Advisory Committee's Note.

The crux of the Petitioner's argument is that the Second, Fifth and Sixth Circuits have held that a claim surviving pretrial dismissal motions and receiving a full scale trial are not frivolous within the meaning of Rule 11. The Petitioner, however, fails to cite any case law from these circuits that makes such a broad declaration. Petitioner has relied on dicta to support his position and hence, has misstated the law. The Petitioner cites *Healey v. Chelsea Resources, Ltd.*, 947 Fed.2d 611 (2nd Cir. 1991) for the proposition that the denial of a summary judgment motion demonstrates that the claimant's testimony is not incredible or inadequate as a matter of law. The court in *Healey* made it very clear that:

> *While we do not mean to imply that an attorney automatically gains immunity from Rule 11 sanctions whenever he has successfully fended off a motion for summary judgment,* we cannot, in light of the pretrial record here, uphold the District Court's ruling that counsel should have known Healey's trial testimony would be deemed so incredible that his claims would be found frivolous. (emphasis added)

Id. at 626. *Healey* does not stand for the proposition that if a claim has survived a summary judgment motion absent fraud or other egregious misconduct, no sanctionable violations of Rule 11 can be imposed.

In *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790, 794 (6th Cir. 1988), the Petitioner relies on the court's dicta rather than the court's holding to support his argument. ("If [plaintiff's] claims were so frivolous, we find it remarkable that the district court would allow the case to go to trial".) It is Hornbook law that dicta is not binding in subsequent cases as legal precedent and it certainly cannot rise to the level of creating a sharp division between the circuits. *See e.g., Anheuser-Busch, Inc. v. Stroh Brewery Co.*, 750 F.2d 631 (8th Cir. 1984) (Holding that the presence of a very brief statement in a case from another circuit made in an entirely different factual context should not be seen as establishing a rule of law.)

Petitioner has also cited the case of *National Association of Govt. Employees, Inc. v. National Federation of Fed. Employees*, 844 F.2d 216, 223 (5th Cir. 1988)[1] for

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[1] The Petitioner claims that there exists a sharp division in the circuits regarding whether a claim that has survived pretrial dismissal motions and received a full scale trial can be unsupported in fact or unwarranted in law within the meaning of Rule 11. The Petitioner has cited *National Association of Govt. Employees v. National Federation of Fed. Employees*, 844 F.2d 216 (5th Cir. 1988) and *Mihalik v. Pro Arts*, 851 F.2d 790 (6th Cir. 1988) for the proposition that claims surviving through trial are not frivolous within the meaning of Rule 11. However, the Petitioner has also cited cases from the same circuits for the proposition that a claim's survival through trial bears no relation to the sanctions practice. *See e.g., Jennings v. Joshua Independent School District*, 877 F.2d 313. (5th Cir. 1989) *cert. den.*, 496

[footnote continued]

the proposition that Rule 11 sanctions are inappropriate where a court has denied a directed verdict and suggested settlement. The court actually held that since the filing of the original Complaint was not redundant, and that the Complaint was well grounded, there could be no basis for Rule 11 sanctions. *Id.* at 224. The Petitioner has mistaken the court's dictum in reference to 28 U.S.C. §1927 to mean that Rule 11 sanctions are inappropriate if a case has survived a motion for directed verdict.

Petitioner has also cited *Sullivan v. School Board of Pinellas County*, 773 F.2d 1182 (11th Cir. 1985) for the proposition that a claim surviving attack by pretrial motion and going to trial is not apt for Rule 11 sanctions absent special circumstances. In this instance, the Petitioner has completely misstated the holding in *Sullivan*. The court did not even make a single reference to Rule 11. The court instead was making reference to attorney's fees under Title VII.[2] Furthermore, *Sullivan* stated that

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U.S. 935 (1990); *LeMaster v. United States*, 891 F.2d 115 (6th Cir. 1989) and *Mann v. G&G Mfg, Inc.*, 900 F.2d 953 (6th Cir. 1990) *cert. den. sub. nom. Sloan v. G&G Mfg., Inc.*, ___ U.S. ___ 112 L.Ed.2d 398, 111 S.Ct. 387 (1990). This shows that there does not exist a true conflict between the circuits, but rather that sanctions are best considered on a case by case basis.

[2]The standard for attorney's fees under Title VII is quite clear. "If plaintiff's case, viewed as a whole, was objectively 'frivolous, unreasonable, or without foundation', the court should award fees even though plaintiff survived motion to dismiss for failure to state a claim or for summary judgment." *Greenberg v. Hilton Int'l. Co.*, 870 F.2d 926, 940 (2d Cir. 1989), *vacated on other grounds*, 875 F.2d 39 (2d Cir. 1980). (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)). "Cases that are ultimately viewed as frivolous may well survive motions to dismiss under a system of notice pleading that does not require factual detail and even motions for summary judgment in which the evidence may be presented in sketchy fashion and credibility may not

[footnote continued]

while it is an important factor in determining whether a claim is frivolous to look at whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits, that was only a general guideline and not a hard and fast rule. Determinations regarding frivolity are to be made on a case by case basis. *Id.* at 1189.

In *Foster v. Mydas Associates, Inc.*, 943 F.2d 139, the court held that:

> "The circuits are in agreement that where fees are sought by a prevailing defendant against an unsuccessful plaintiff in a civil rights case, one relevant factor will often be whether the plaintiff succeeded in making out a prima facie case – a circumstance which may well prompt a reviewing tribunal to ask whether the plaintiff's case withstood summary judgment and/or directed verdict motions. But that factor, standing alone, is not entitled to decretory significance."

Id. at 144. *See also, Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 606 (1st Cir. 1988) (summary judgment standard and Rule 11 standard are not necessarily or inevitably congruent); *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1473 (2d Cir. 1988), *rev'd*

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be taken into account. Indeed, in analogous circumstances, we have affirmed an award of fees to defendants in cases that were sufficient to go to the jury." *Id.* at 940. Numerous other circuits have awarded sanctions to prevailing defendants in Title VII cases despite the fact that plaintiffs were allowed to present their cases. *See e.g., Lewis v. Brown & Root, Inc.*, 711 F.2d 1287 (5th Cir. 1983) *cert. den.* 467 U.S. 1231 (1984); *Coleman v. General Motors Corp.*, 667 F.2d 704 (8th Cir. 1981). The Standard for §1988 claims is also very clear. *See e.g., Brown v. Borough of Chambersburg*, 903 F.2d 274, 279 (3rd Cir. 1990 (The denial of a motion for a directed verdict has not, as a matter of law, foreclosed consideration of a defendant's later request for fees based on the frivolousness of the claim.)

on other grounds sub nom. Pavelic v. LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (it is entirely possible that a baseless factual claim will survive a motion for summary judgment); *Barrios v. Pelham Marine, Inc.*, 796 F.2d 128, 132 (5th Cir. 1986) (holding that Rule 11 sanctions are appropriate despite the fact that claim survived a motion for summary judgment.); *LeMaster v. U.S.*, 891 F.2d 115, 121 (6th Cir. 1989) (*all courts* addressing this issue have concluded that mere survival of a summary judgment motion, in which all facts are construed in the non-movant's favor, does not insulate a party from sanctions if it is later determined that all factual claims were groundless. (emphasis added)); *Mann v. G&G Mfg., Inc.*, 900 F.2d 953, 961 (6th Cir. 1990) *cert. den. sub. nom. Sloan v. G&G Mfg., Inc.*, ___ U.S. ___ 112 L.Ed.2d 398, 111 S.Ct. 387 (1990) (given the significant differences between a motion for summary judgment and a Rule 11 motion, it is not surprising that a district court's ruling on a Rule 56 motion for summary need not determine the outcome of the district court's ruling on a Rule 11 motion for sanctions.)

The Petitioner has demonstrated no true, acknowledged conflict between any of the decisions cited and the ruling of the Eleventh Circuit in this case.

POINT II

THERE DOES NOT EXIST A SHARP DIVISION IN THE CIRCUITS REGARDING WHETHER TO ADOPT THE "LEAST SEVERE SANCTION" TEST FOR REVIEWING RULE 11 SANCTIONS.

The circuits are not in sharp conflict regarding whether to adopt the "lease severe sanction" test for reviewing Rule 11 sanctions.

The basis of the Petitioner's second argument is that under the "least severe sanction" standard, courts invoking Rule 11 may impose only the least severe sanction adequate to serve the purposes of the rule. The Petitioner, however, fails to cite any case law that makes such a statement. Rather, the cases cited by the Petitioner hold that the sanction imposed *should* be the least severe sanction adequate to the purpose of Rule 11. *See, e.g., Thomas v. Capital Security Serv., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988) (*en banc*) (emphasis added).

The circuit courts have unanimously emphasized the discretion of the district courts to impose an appropriate sanction. A district court may impose sanctions once a violation of Rule 11 is found, but the district court retains broad discretion in determining the "appropriate" sanction under the rule. *Thomas* at 878.

Furthermore, the remaining circuits, including the Eleventh Circuit, have consistently focused primarily on the deterrent purpose of Rule 11, asking what sanction will discourage future frivolous litigation and poor lawyering practices without punishing the offending party or counsel beyond the point of adequate deterrence. *See e.g., Langer v. Monarch Life Insurance Co.*, 966 F.2d 786 (3rd Cir. 1992) (agreeing with the Fifth Circuit that whatever the ultimate sanction imposed, the district court should utlize the least severe sanction that furthers the purposes of Rule 11). *See also Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986) *cert. den. sub. nom. Suffolk County v. Graseck*, 980 U.S. 918 (1987) (holding that it lies well within the district court's discretion to temper the amount to be awarded against an offend-

ing attorney by a balancing consideration of his ability to pay).[3]

The case cited by the Petitioner to demonstrate a conflict in the Eleventh Circuit is inapplicable. In *Avirgan v. Hull*, 932 F.2d 1572 (11th Cir. 1991), *cert. den.*, ___ U.S., 116 L.Ed.2d 813, 112 S.Ct. 913 (1992), the court affirmed more than a million dollars in sanctions based upon the bad faith exception to 28 U.S.C. §1927 and Federal Rule of Civil Procedure 11. *Id.* at 1582. Petitioner has misstated the holding in *Avirgan* because the sanction award was not based primarily on Rule 11.

Both the instant case and prior Eleventh Circuit decisions have focused primarily on reasonable sanctions to deter abuse without punishing the offending party or counsel beyond the point of adequate deterrence. *See e.g., Norton Tire Co., Inc. v. Tire Kingdom Co., Inc.*, 858 F.2d 1533, 1536 (11th Cir. 1988) (holding that although binding precedent plainly foreclosed plaintiff's antitrust claim, the trial judge did not abuse his discretion by refusing to impose Rule 11 sanctions.); *Roleston v. Eldridge*, 848 F.2d 163, 165-66 (11th Cir. 1988) (holding that refusal to impose sanctions under Rule 11 against civil rights plaintiff who should have known that his federal civil rights complaint lacked merit was not an abuse of discretion.). Petitioner has demonstrated no true, acknowledged conflict between any of the decisions cited and the ruling of the Eleventh Circuit in this case.

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[3]The court was making reference to both Rule 11 and 28 U.S.C. §1927.

POINT III

THERE DOES NOT EXIST A SHARP CONFLICT BETWEEN THE CIRCUITS REGARDING WHETHER THE COLLATERAL COSTS OF JUDICIAL ADMINISTRATION, SUCH AS JUROR'S FEES, MAY BE AWARDED AS A RULE 11 SANCTION.

The cases cited by the Petitioner to demonstrate conflict are inapplicable. The Petitioner has cited *Blue v. Dept. of the Army*, 914 F.2d 525, 548 (4th Cir. 1990), *cert. den. sub. nom.*, and *Chambers v. United States Dept. of the Army*, ___ U.S. ___ 113 L.Ed.2d 645, 111 S.Ct. 1580 (1991), for the proposition that judicial and support staff salaries could not be shifted to either counsel or to a party as a Rule 11 sanction. The case is inapplicable because sanctions were awarded based upon Rules 11 and 16 of the Federal Rules of Civil Procedure, the "bad faith" exception to the American rule, and 28 U.S.C. §1927. Furthermore, the sanctions dealing with court costs utilized 28 U.S.C. §1920.

In *Blue*, the court stated, "we do not hold that it is never appropriate for a district court to assess against a party nominal court expenses not provided for in 28 U.S.C. §1920 . . . However, [because of the] magnitude [of the sanctions] we therefore set aside the sanctions for court salaries, leaving intact the imposition of court costs for the expenses of the clerk of the court and the court reporter which are authorized under 28 U.S.C. §1920." *Id.* at 548. The other two cases mentioned by the Petitioner, *White v. Raymark Indus.*, 783 F.2d 1175 (4th Cir. 1986) and *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) are both inapplicable because they do not even mention Rule 11.

The circuits are in agreement that in certain circumstances it may be appropriate for a district judge to

impose Rule 11 sanctions in the form of a fine and that the district judge is free to fine an attorney for the court's time, but that fine must be based on court costs and paid to the clerk's office. *See Eisenberg v. University of New Mexico*, 936 F.2d 1131, 1136 (10th Cir. 1991).

Once again the Petitioner has failed to demonstrate a true conflict between any of the decisions cited and the ruling of the Eleventh Circuit in this case. There is nothing to support the Petitioner's argument that court costs may not be awarded as a Rule 11 sanction.

POINT IV

THE CURRENT CONFLICT REGARDING WHETHER 28 U.S.C. R 455(a) MANDATES THAT THE CAUSE OF APPARENT PARTIALITY OR BIAS MUST STEM FROM AN EXTRAJUDICIAL SOURCE IS NOT APPLICABLE TO THE CASE AT BAR.

Finally, the Petitioner has demonstrated a true acknowledged conflict between the circuits. The circuits are in conflict regarding whether 28 U.S.C. § 445(a) requires that the cause of apparent partiality or bias must stem from an extrajudicial source. *See e.g., Waller v. United States*, ___ U.S. ___ 119 L.Ed.2d 239, 112 S.Ct. 2321 (1992) (White and O'Conner, J.J., dissenting from denial of certiorari because of conflict on this issue).

The First Circuit has held that the source of the asserted bias/prejudice in a 28 U.S.C. §455(a) claim can originate explicitly in judicial proceedings. *United States v. Chantal*, 902 F.2d 1018, 1022 (1st Cir. 1990). *See also, Panzardi-Alvarez v. United States*, 879 F.2d 975, 983-984 (1st Cir. 1989) *cert. den.* 493 U.S. 1082 (1990); *United States v. Kelly*, 712 F.2d 884, 889-890 (1st Cir. 1983); *United States v. Cepeda Penes*, 577 F.2d 754,

758 (1st Cir. 1978); *United States v. Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), *cert. den.*, 430 U.S. 909 (1977).

Other circuits have explicitly rejected the First Circuit's approach to 28 U.S.C. §455(a). *See e.g., United States v. Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989) (holding that "the alleged bias must derive from an extrajudicial source. It must result in an opinion on the merits on a basis other than that learned by the judge from his participation in the matter.") (quoting *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987))

Although the Petitioner has brought up the issue of the district judge's recusal practice, the Petitioner has never brought up the issue of whether the source of the district judge's bias stemmed from an extrajudicial source. Neither the district court nor the court of appeals addressed this question directly. There is no mention of the alleged bias stemming from an extrajudicial source in the opinion of either the trial court or the ruling of the court of appeals. *See, Searle & Co. v. Cohn*, 455 U.S. 404, 414 (1982) (reasoning that it is unwise to pass upon the constitutionality of an issue in light of the fact that the lower courts in the case did not address the issue.).

Furthermore, this Court has already had an opportunity to rule on bias and an extrajudicial source with reference to 28 U.S.C. §144. *See, United States v. Grinnel Corp.*, 384 U.S. 563, 583 (1966) (holding that the alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the Judge learned from his participation in the case.)

In addition, the recusal practice of the district judge in this case does not conflict with any decisions of this

court. *See e.g., Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986) (stating that only in the most extreme cases would disqualification of a judge on the basis of general bias or prejudice be required in a civil case.) There is nothing to support the Petitioner's argument that the recusal practices of the district judge conflicted with decisions of this court.

CONCLUSION

The Petitioner has demonstrated no true, acknowledged conflict between any of the decisions cited and the ruling of the Eleventh Circuit in this case in regards to the first three issues. As far as the fourth issue is concerned, the current conflict between the circuits is not applicable to the case at bar. For these reasons, the Petition for Writ of Certiorari to review the ruling of the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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September 9, 1992